

2663D OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT WITH A CHILD UNDER 16 YEARS OF AGE IN THE MOTOR VEHICLE — § 346.63(1)(a) and § 346.65(2)(f)1.

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway¹ while under the influence of an intoxicant while there is a minor passenger under 16 years of age in the vehicle.²

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle³ on a highway.⁴

[“Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]⁵

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁶

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

3. There was a minor passenger under 16 years of age in the vehicle.

Knowledge of the passenger's age is not required and mistake regarding the

passenger's age is not a defense.⁷

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.⁸

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).⁹

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.¹⁰

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED¹¹ AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹² THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

**IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING
MAY BE ADDED:¹³**

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663D was approved by the Committee in June 2010. This revision was approved by the Committee in December 2022; it updated the comment.

This instruction is drafted for first offense OWI violations that are criminal because there was a minor passenger under 16 years of age in the vehicle. See § 346.65(2)(f)1., created by 2009 Wisconsin Act 100. Because the presence of the minor passenger makes conduct criminal that would otherwise be a forfeiture, the Committee concluded that it becomes an element of the crime. The Wisconsin Court of Appeals agreed in State v. Gahart, --Wis.2d--, --N.W.2d-- (Ct. App. 2022). In that decision, the court cited the Committee's conclusion with approval and observed that "the Legislature explicitly and unambiguously recognized the presence of a minor passenger as an element of operating while intoxicated."

This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration, combine Wis JI-Criminal 2660 with this instruction. For violations involving a controlled substance, combine Wis JI-Criminal 2664 with this instruction. For offenses involving drugs, combine Wis JI-Criminal 2666 with this instruction. For offenses involving the combination of alcohol and a controlled substance, combine Wis JI-Criminal 2664A with this instruction. For offenses involving a detectable amount of a restricted controlled substance, combine Wis JI-Criminal 2664B with this instruction.

1. Regarding the "on a highway" requirement, see Wis JI Criminal 2600 Introductory Comment, Sec. I, and Wis JI Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI Criminal 2600 Introductory Comment, Sec. I., and Wis JI Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI Criminal 2600 Introductory Comment, Sec. III.

7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.22(6) and 939.43(2).

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, *supra*. For a discussion of issues relating to the definition of "under the influence," see Wis JI Criminal 2600 Introductory Comment, Sec. VIII.

9. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary

significance depends on the applicability of other provisions in § 885.235. See Wis JI Criminal 2600 Introductory Comment, Sec. VII.

10. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range “is relevant evidence on intoxication . . . but is not to be given any prima facie effect.” Wis JI Criminal 232 provides an instruction for this situation.

11. Regarding the evidentiary significance of test results, see Wis JI Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the “blood alcohol curve,” see Wis JI Criminal JI 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI Criminal 2600 Introductory Comment, Sec. VII.